

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FS:MAN:1:TL-N-3483-01

VJKanrek

date:

to: Robert Satz, Territory Manager, LMSB Territory 1110, Group [REDACTED]
Attention: [REDACTED], Senior CEP Team Coordinator

from: Area Counsel (LM:FS:MAN)

subject: [REDACTED]

U.I.L. Nos. 6229.02-00, 6501.08-17, 6511.00-00, 6511.05-00,
6230.03-00

INTRODUCTION

This memorandum responds to your written request dated May 25, 2001, regarding [REDACTED] ("the taxpayer"). This memorandum should not be cited as precedent. Specifically, you have asked for our opinion as to whether an adjustment to a partnership item may now be made, at the partner level, where the TEFRA statute of limitations on assessment set forth in I.R.C. section 6229 has expired.

ISSUE

May the Internal Revenue Service (IRS) make an adjustment to a partnership item of the taxpayer, where the TEFRA statute of limitations with respect to the partnership under section 6229 has expired?

CONCLUSION

In [REDACTED], the taxpayer and the IRS settled as to the issue of the correct year in which to report certain income. That settlement, which moved income from [REDACTED] to [REDACTED], presumed that such income was not to be reported in [REDACTED]. (b)(7)a
[REDACTED]
[REDACTED]

FACTS

This opinion is based on the facts set forth herein. It may change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon. You should be aware that, under routing procedures which have been established for opinions of this type, we have referred this memorandum to the National Office of Chief Counsel for review. That review might result in modification to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office, which should be in approximately ten days. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

Two corporations ([REDACTED] and [REDACTED]), which were included in the consolidated return of the taxpayer for the [REDACTED] and [REDACTED] taxable years, were partners in a partnership ([REDACTED] / [REDACTED]). That partnership was a partner in two partnerships, [REDACTED] ([REDACTED]) and [REDACTED] ([REDACTED]). During the course of IRS examinations of the [REDACTED] year of [REDACTED] and [REDACTED], employees of [REDACTED], who had prepared the [REDACTED] and [REDACTED] partnership returns, told the IRS that certain long term capital gain (LTCG) that had been included in the partnership returns of [REDACTED] and [REDACTED] for [REDACTED] should have been included in the partnership returns for [REDACTED]. In [REDACTED], the IRS agreed, and increased the [REDACTED] and [REDACTED] partnership income for [REDACTED] by the amounts of the LTCG. This resulted in a deficiency for [REDACTED] which the taxpayer, as parent of the consolidated group that included [REDACTED] and [REDACTED], paid in [REDACTED]. It appears that the [REDACTED] year of [REDACTED] and [REDACTED] was not examined. The LTCG was never removed from the [REDACTED] year of [REDACTED] and [REDACTED].

Consents to extend the TEFRA statute of limitations were not executed for either the [REDACTED] or the [REDACTED] years of the [REDACTED] and [REDACTED] partnerships. According to the workpapers you provided to us, the statute of limitations on assessment for the [REDACTED] taxable year of these partnerships expired on [REDACTED]. While there was no dispositive information provided to us on this matter, we have assumed that the partnerships filed their [REDACTED] returns sometime in [REDACTED] and that the statute of limitations for each partnership's [REDACTED] taxable year would have expired no earlier than sometime in [REDACTED].

The taxpayer had correctly determined that the LTCG of

██████████/██████████ was included in two separate tax years, i.e., the ██████ year per the IRS audit, and the ██████ year per the consolidated return as filed. According to the Revenue Agent's notes, adjustments effecting the shift of LTCG from ██████ to ██████ were made in ██████ and ██████. The taxpayer prepared an internal memorandum dated ██████, in which this was analyzed in detail. The ██████ memorandum states, "a reversal of the ██████ gains recognized in ██████ should be proposed to the IRS agent." The Revenue Agent's handwritten notes on the ██████ memo clearly state, "Reversal of LTCG should be approved in ██████." The Revenue Agent's notes, dated ██████, state, "R/A gave audit adjustment for LTCG only in ██████. Therefore a reversal of ██████ gains recognized by T/P in ██████ should be approved by the IRS [Revenue Agent] for the year ██████." (emphasis in original). The memorandum was apparently provided to Revenue Agent ██████ shortly thereafter, and he made handwritten notes dated ██████, to which he attached his annotated copy of the ██████ memo. His handwritten comments reflect the agreement of the IRS and the taxpayer that the LTCG income would be removed from the ██████ year because it constitutes a "double inclusion" of income to the taxpayer. ██████ continues to work on the examination of the taxpayer today.

At this time, the ██████ through ██████ taxable years of the taxpayer are under examination. The statutes of limitations for the taxable years ended December 31, ██████ through December 31, ██████ have been extended until ██████, via a Form 872, Consent to Extend the Time to Assess Tax. That Form 872 makes reference only to "██" and contains no reference to any of the aforementioned partnerships.

DISCUSSION

Under section 6229(a), the period for assessing any tax attributable to partnership items with respect to any partner will not expire before three years from the later of the due date of the partnership return (determined without regard to extensions) or the date the partnership return is filed. I.R.C. § 6229(a). Under section 6227(a), a partner may file a request for an administrative adjustment for a partnership year within 3 years of the date on which the partnership return is filed, or the last day for filing the partnership return for a particular year (determined without regard to extensions), and before the IRS mails a notice of final partnership administrative adjustment to the tax matters partner. Section 6227(b) provides that the period under section 6227(a) shall be extended for the period within which an assessment may be made pursuant to an agreement

(or any extension thereof) under section 6229(b), and for 6 months thereafter. No adjustment to income may be made after the limitations period has expired.

In the instant matter, the [REDACTED] year of the partnerships was examined, the [REDACTED] year was not. No extensions of the statute of limitations with respect to the partnerships were secured. The Form 872 extending the period of limitations on assessment for the taxpayer does not pertain to the partnerships at issue herein, since the Form 872 does not contain any reference to the partnerships. I.R.C. § 6229(b)(3). See Rhone-Poulenc v. Commissioner, 114 T.C. 533, 549-550 (2000) ("any agreement under section 6501(c)(4) shall apply to partnership-level adjustments only if the agreement expressly provides that it applies to tax attributable to partnership items"). As the TEFRA statute of limitations for the [REDACTED] taxable year of the partnerships expired sometime in [REDACTED], it would not generally be possible to make an adjustment to a partnership item for [REDACTED] at this time, unless under some theory the statute of limitations remains open.

(b)(7)a



. Section 6230(c)(1)(B) provides that, where the IRS fails to allow a credit or make a refund attributable to the application to a partner of a settlement, a partner is entitled to file a claim for refund based on the settlement. Unlike section 6227, which the Tax Court has ruled requires strict compliance with the procedures for a claim for refund under TEFRA, see Phillips v. Commissioner, 106 T.C. 176, 181 (1996) (statute does not authorize the Secretary to consider nonconforming request under section 6227), the regulations underlying section 6230 contain no such restrictions. But see Wall v. United States, 96-1 USTC ¶ 50,307 (9th Cir. 1996) (substantial compliance with TEFRA procedures sufficient to allow relief under section 6227). Temp. Reg. § 301.6230(c)-1T provides, in pertinent part, that "a claim for refund under section 6230(c) shall state the grounds for the claim." (b)(7)a

(b)(7)a

Pursuant to Treas. Reg. § 301.6230(c)-1T, a claim for refund "shall state the grounds for the claim."¹ (b)(7)a

When a claim for credit or refund involves partnership items, section 6511 defers to the TEFRA provisions of the Code, and provides that the provisions of "section 6227 and subsections (c) and (d) of section 6230 shall apply in lieu." I.R.C. § 6511(g). Section 6230(c)(2)(B) provides that any claim for refund under paragraph (1)(B) shall be filed within two years after the day on which the settlement is entered into. (b)(7)a

¹ As a general rule, a claim for refund of an overpayment of income taxes shall be made on the appropriate income tax return. Treas. Reg. § 301.6402-3(a)(1). However, it is well-settled that a failure to meet the formal requirements regarding claims for refund will not necessarily obviate a taxpayer's right to a refund where the Commissioner was not misled or deceived by the failure to file a formal claim. Newton v. United States, 163 F. Supp. 614, 618 (Ct. Cl. 1958) (citing Bonwit Teller & Co. v. United States, 283 U.S. 258 (1931))

(b)(7)a

(b)(7)a

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views. This advice relates solely to the facts of this case and should not be used or applied to the facts of any other case. If you have any questions concerning this memorandum, please contact Victoria J. Kanrek at (212) 264-1595, ext. 238.

ROLAND BARRAL
Area Counsel - LMSB:FS Area 1

By: _____
VICTORIA J. KANREK
Senior Attorney (LMSB - Area 1)